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Supreme Court

OF THE

United States.

DEVER PICKENS, Appellant.

versus

SUSAN C. DENT RAY *et al.*, Appellees.

No. 78.

October Term, 1902.

Appeal from the United States Circuit Court of Appeals for the Fourth Circuit, at Richmond.

Brief for Appellant.

STATEMENT OF CASE.

On the 27th day of January, 1888, Susan C. Dent instituted her action of Trespass on the Case in Assumpsit in the Circuit Court of Barbour county, West Virginia, against the appellant, to recover damages for the alleged breach of marriage contract on his part.

To her declaration appellant appeared and pleaded non-assumpsit, and issue was thereon joined.

On the 28th day of January, 1889, the said plaintiff filed a bill in equity, pending the said action of assumpsit and before the issue joined thereon was tried, to set aside as fraudulent a certain deed of trust made by the appellant to John J. Davis and Hon. A. G. Dayton, trustees, on the 14th day of January, 1889, and assailing as fraudulent certain debts therein secured to Ann M. Pickens, Rachel M. Boring and others.

At the September Rules, 1889, she filed an amended bill in equity, alleging that since the filing of her original bill she had recovered judgment on the 23d day of July, 1889, against the appellant for $10,000.00, with interest thereon from date of judgment, [illegible] costs. A writ of error was obtained by appellant from [illegible]ent from the Supreme Court of Appeals of West Virginia, and the same was thereafter reversed and set aside by that Court, and a new trial awarded him.

In February, 1898, the said action of assumpsit was again tried in the Circuit Court of Barbour county, and on the 27th day of February, 1892, the plaintiff, Susan C. Dent, recovered a judgment against the appellant for $9,000.00, with int. from that date, and $971.34 costs. After the recovery of this last named judgment, the said Dent filed her second amended bill in the Circuit Court of Barbour county, alleging the recovery of said judgment, and assailing as fraudulent a certain marriage settlement made between the appellant and Minnie Coburn, who is now his wife, and also further assailing the said deed of trust, and praying that said marriage settlement and said deed of trust might bedeclared fraudulent as to her said judgment, and that the property embraced therein be subjected to its payment. Depositions were taken and said chancery cause was matured for hearing and submitted for final decree, and at the November term, 1896, of the said Circuit Court of Barbour county, a decree was pronounced therein, dismissing the plaintiff's bill and decreeing costs in favor of appellant. From this decree the said Dent obtained an appeal to the Supreme Court of Appeals of West Virginia, and upon the hearing of said appeal the said decree was reversed and cause remanded for further proceedings to be had

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in accordance with the mandate of said Court. The cause stood thus until the February term, 1900, of the said Circuit Court of Barbour county.

In the meantime, to-wit, on the 27th day of October, 1899, the appellant filed his petition in bankruptcy in the District Court of the United States for the District of West Va., praying to be adjudged a voluntary bankrupt, and on the 30th day of October, 1899, he was duly adjudicated a bankrupt by said Court. Thereafter, to-wit, on the 2d day of November, 1899, while said cause was still pending in the said Circuit Court of Barbour county and before the rendition of the decree therein complained of in the appellant's bill in this cause (see decree, printed record, p. 18), appellant filed his answer in said chancery cause, alleging his adjudication as a bankrupt, and praying that all further proceedings therein be suspended and stayed until the bankruptcy proceedings were finally heard and determined, and that by reason of said adjudication in bankruptcy, all appellant's property interests, rights, estate, &c., had passed under the control and jurisdiction of said bankruptcy court, and could alone be administered and disposed of by its order.

On the 18th day of November, 1899, Harvey W. Harmer, the referee in bankruptcy, appointed Henry Haymond trustee in bankruptcy of appellant's estate.

On the — day of February, 1900, the said trustee, Haymond, filed a petition and answer in said chancery cause pending in Barbour county, at the instance of one of the counsel for the said Susan C. Dent, the answer or petition having been prepared by the referee in bankruptcy, praying the said Circuit Court to proceed in said cause and in the enforcement of the liens against the estate of said bankrupt, which answer or petition was filed without any order or direction from the said bankrupt court to the said trustee to so proceed, and solely at the instance of the counsel for said Dent and at the suggestion of the referee in bankruptcy, who had no authority to advise in the premises. (See printed record, p. 16.)

On the 23d day of February, 1900, the said Circuit Court of Barbour county, notwithstanding appellant had been adjudicated a bankrupt on the said 30th day of October, 1899, and had filed his

supplemental answer in said chancery cause on the — day of October, 1899, wherein he alleged his bankruptcy and prayed for a suspension of further proceedings in said chancery cause, proceeded to hear the same and rendered a decree therein, annulling the said deed of trust and the said marriage settlement with Minnie Coburn, and holding that certain debts in said trust secured to Ann M. Pickens, Rachel M. Boring and the estate ofJames Pickens to be fraudulent and void, appointing J. Hop Woods, another one of the counsel of said Miss Dent, a special receiver to rent out the land named in the bill in said cause, until the 30th of October, 1900, and also a special commissioner to sell the said land, who was directed to take possession of the same under a writ of possession which by said decree was awarded him. (See decree, printed record, p. 18.) By this decree the Circuit Court of Barbour county undertook to divest the trustee in bankruptcy of the possession of said bankrupt's property, and turn it over to a receiver and commissioner of its own appointment, the right of possession as well as the right of property thereon at that time being in the trustee in bankruptcy by virtue of his appointment as such, and the operation of the Act of Congress entitled "An Act to Provide a Uniform System of Bankruptcy Throughout the United States."

On the 20th day of November, 1899, and *before* the rendition of the decree of the 23d day of February, 1900, the said Susan C. Dent, by her attorney, Edwin Maxwell, proved her debt or judgment before the referee in bankruptcy, as a debt against the estate of said bankrupt. By appearing and proving her claim in bankruptcy Miss Dent must be regarded as having chosen the forum in which to pursue her debtor, and was barred from prosecuting her claim in another tribunal, and the decree of the 23d day of February, 1900, ought not to have been rendered.

After the several acts and proceedings hereinbefore recited had transpired, and the special receiver and commissioner Woods had advertised the land of appellant for rent, and was proceeding to execute the decree of the Barbour county Circuit Court, the appellant filed his bill in equity in the District Court of the United States for the District of West Virginia, alleging his bankruptcy, the appointment of a trustee in bankruptcy, the pendency of the said suit

in chancery in the Circuit Court of Barbour county, the filing of his supplemental answer therein, setting up his adjudication as a bankrupt, the rendition by the said Court of the decree of sale and rental, and the advertisement of said lands for rent by said Woods special receiver, the proof of said debts before the referee in bankruptcy, and especially the proof by the said Miss Dent of her debt against appellant, alleging that such proof on her part barred her from prosecuting her claim further in the said Circuit Court of Barbour county, and stating in his said bill, 1, the debts due and owing by him, several of which had not been provided for in said decree; 2, also the nature and character of the estate he held in said land devised to him by the will of James Pickens, deceased; 3, the want of proper parties to said bill of Miss Dent, viz, Jennie B. Pickens and —— Young; 4, that the said Miss Dent had fraudulently procured the answer or petition of the said Haymond, trustee, to be filed in said chancery cause for the sole purpose of preventing the estate of appellant from being administered in a court of bankruptcy, and the debts and liens against the same and the priorities of his several creditors from being adjudicated therein. The prayer of the appellant's bill is for an injunction to restrain the plaintiff in said chancery suit and each of the defendants named therein, creditors of appellant, from all further proceedings therein, and to restrain the said Woods as special receiver and commissioner from proceeding under said decree to either rent or sell said lands mentioned therein and described in the will of James Pickens, during the pendency of said bankruptcy proceedings. An injunction was awarded as prayed for by the Judge of the said United States District Court, on the 31st day of March, 1900. (See printed record, p. p. 8-9.)

(We think it proper to state to the Court at this point that either the clerk in copying the record, or the printer in printing it, has inadvertently omitted to insert a copy of the will of James Pickens, deceased, which was filed with appellant's bill and marked Exhibit "J." Leave is asked now to supply said omission by filing a copy of said will.)

After said injunction was awarded and process served on the defendants to the bill, Susan C. Dent, on the 4th day of April, 1900, gave notice that on the 16th day of April, 1900, at Clarksburg, Har-

rison county, West Va., she would move the United States District Court for a dissolution of said injunction, and on the day named in said notice for dissolution, she and the said Haymond, trustee in bankruptcy, and the said Woods, as special receiver and special commissioner, filed their separate answers to the bill, to which appellant replied generally, and the further hearing of the motion was adjourned to Parkersburg, for the 27th day of April, 1900. On the day last named the cause was argued, and the Court took time to consider of the motion, and on the 26th day of July, 1900, dissolved the said injunction and dismissed appellant's bill and awarded costs against him.

The answers of Haymond and Woods admitted substantially the allegations of the bill with reference to them, said Haymond alleging in his answer that he was advised or induced to file his said petition or answer in the chancery cause of Susan C. Dent against appellant and others by one of her counsel, and that his said answer was prepared by the referee and sworn to by him before said referee, that he filed said answer without the order or leave of said District Court, and at the suggestion of counsel for Susan C. Dent. The said Susan C. Dent in her answer denied the jurisdiction of the said District Court to suspend the proceedings in her said chancery suit, denied that she fraudulently procured said Haymond to file his answer therein, and prayed for a dissolution of the said injunction. These several answers are to be found on p. p. 27, 29 and 42 of printed record.

From the order of the District Court dissolving said injunction, the appellant, on the 2d day of August, 1900, applied for an appeal, which was allowed, and was to have the effect of a supersedeas upon his giving bond with security in the sum of five hundred dollars, which bond was given on the 4th day of August, and the appeal perfected.

With his petition for an appeal appellant assigned the following errors:

First. It was error to hold that the District Court had not jurisdiction of the matters alleged in the appellant's bill of complaint.

Second. It was error to dismiss the complainant's bill, and not

grant the relief therein, for the reason that the matters therein were of equitable cognizance and entitled the complainant to the relief asked therein.

Third. For other errors apparent on the face of the record.

The United States Circuit Court of Appeals for the Fourth Circuit refused to reverse the decision of the District Court, and a further appeal to the Supreme Court of the United States was taken in due form.

The point on which the decision of the District Court must be sustained or reversed is purely one of *jurisdiction*. The appellant maintains that under the Bankruptcy Act of 1893, the District Court of the United States may, in a proper case, take jurisdiction of the property of the bankrupt, even though a suit concerning such property is at that moment pending in a State Court of competent jurisdiction.

It cannot be contended that the very fact of bankruptcy confers exclusive jurisdiction of the bankrupt's property on the District Court. In fact, only in peculiar cases will a Federal Court sitting in bankruptcy take jurisdiction of property to the exclusion of a State Court which is already concerned in the matter. But we submit that the present case discloses the necessary peculiar conditions.

Section 2, sub head 7, of the Bankruptcy Act of 1893, gives Courts of Bankruptcy the power to "cause the estates of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto, except as otherwise herein provided." The same section also says "nothing in this section shall be construed to deprive a court of bankruptcy of any power it would possess were certain specific powers not herein enumerated." These clauses confer a plenary jurisdiction over the property of the bankrupt, authorizing the bankruptcy court to reduce the property of the bankrupt into possession and to determine litigation concerning such property in other courts, except in so far as the provisions of this Act expressly limit such jurisdiction.

Well settled principles of law and comity prevent an assumption of jurisdiction by a Federal Court to the exclusion of a State Court in cases of concurrent jurisdiction, but these principles will not apply in bankruptcy cases, exclusive jurisdiction, according to the Constitution, being in the Federal Courts, unless rights have become vested or liens affixed to the property in question. In the present case the subject matter of the controversy was, it is true, before the State Court, but no rights had been determined before the filing of the petition and the discharge in bankruptcy of the appellant, Dever Pickens. The last decree of the Circuit Court of Barbour county previous to the discharge in bankruptcy was entered in 1896, and on April 13th 1899, the Supreme Court of Appeals of West Virginit refused to sustain the Court below, reversed the said decree and remanded the cause to the Barbour Circuit Court for further proceedings. The proceedings in bankruptcy were instituted and completed before such further action was taken by the Barbour Circuit Court, and the said bankruptcy proceedings were brought to the notice of that Court by a proper pleading before any further action in the matter was taken.

As if despairing of further relief from the Barbour Circuit Court, the appellee proved her claim before the court of bankruptcy, and as we shall endeavor to show later, waived any rights she may have had in any other tribunal and made a final election. It will be seen that at this time the State Court did not have the custody and possession of the property of the bankrupt. There was pending, it is true, an ordinary suit in equity by a creditor of the bankrupt to enforce the lien of a judgment and to subject his property to sale for its satisfaction.

Primarily the fund first available for its payment was his personalty; it must appear to have been exhausted or that he is possessed of none sufficient to satisfy the judgment, to be shown by a proper return upon a writ of fieri facias before the lien as effecting his realty can be enforced in a court of equity. The pendency of the suit did not place the Court in the possession or custody of the property. That could only come under a decree of sale and the appointment of a receiver, and at the time such proceedings did take place, they were wholly void. The adjudication in bankruptcy

had become final, and the State Court having neither custody nor possession of the property, nor yet a lien thereon, the sole right in and over all the property of Dever Pickens was vested in the trustee in bankruptcy. Any attempt to seize the property or wrest it from the control of such trustee was an unwarranted violation of those very principles of equity which have been invoked in behalf of the appellee in the Courts below. The proper and indeed the only defense against such an unauthorized aggression was, and is, an injunction from the Court aggrieved, in this case, the District Court of the United States for the District of West Virginia, directed to the Court encroaching on its rights, namely, the Circuit Court of Barbour county.

While no case has arisen in which a pending suit in a State Court has been enjoined by a Federal Court sitting in bankruptcy, the propriety of the remedy by injunction is shown by the frequent decisions sustaining injunctions forbidding State officials to sell property of a bankrupt under an execution levied after the discharge in bankruptcy. Supposing the action of the State Court to be unwarranted, the propriety of a remedy of this nature cannot be questioned. While under the Revised Statutes (Section 720), a writ of injunction will not be granted to stay proceedings in a State Court, cases in bankruptcy are excepted. If no proceedings had been commenced in the State Court prior to the discharge in bankruptcy, the propriety of the remedy by injunction is not to be doubted.

That the Barbour Circuit Court should have been moved to further action where such further action was so plainly illegal and unnecessary, can only be explained by the fact that a petition urging such action was entered in the name of the trustee in bankruptcy. That such petition was fraudulently procured by the appellee and was entered by the said trustee in entire ignorance of the premises and consequences is plainly shown in the answer of Henry Haymond, trustee, on page 42 of the printed record of the proceedings in Barbour Circuit Court. Having been procured by fraud and in consequence of the admitted ignorance of the trustee in bankruptcy, the petition of said trustee can only be nullity and should have no bearing in this case to the prejudice of the appellant.

Let us suppose, nevertheless, that the pending proceedings in the Circuit Court of Barbour county gave the appellee such a lien on the property in litigation that the District Court sitting in bankruptcy will not intervene. It is plain, nevertheless, that by consent of both parties, the District Court may determine the matter. The appellant submits that when the appellee chose to prove her claim in the bankruptcy court she made an election preventing her from seeking a remedy in any other tribunal, and giving the District Court *jurisdiction by ~~counsel~~* Consent. (See Bankruptcy Act of 1898, Sec. 23, C.)

This position is supported by the case of Dingee v. Becker, 9 B. R. 508. This case arose, it is true, under the Act of 1867, but the Act of 1898, as we insist, does not change the law on the subject, as will appear from Section 11 of the Act of 1898.

It is plain that when Federal and State Courts have concurrent jurisdiction a suitor who pleads his cause in one forum bars his remedy in the other, according to a rule of comity too well known to be disputed. The possible consequences of a contrary view show how necessary this rule is.

Great stress has been placed on the case of Eyster v. Gaff, 91 U. S. 521, in the Court below, and *obiter dicta* have been quoted in opposition to the contention of the appellant, but a casual investigation will show that Eyster v. Gaff differs so widely from the case at bar as to furnish no analogy, much less binding authority.

Prior to 1868 McCluer mortgaged certain lots to the Gaffs, which he also leased to Eyster. In 1868 Gaff instituted a suit to foreclose, which was consummated in 1870, one month after McCluer's discharge in bankruptcy. Gaff having purchased the lots at the sale in the foreclosure suit, Eyster sought to eject him on the ground that the sale by the State Court was void, sole title to the land being in the assignee in bankruptcy. This Court properly held that the assignee took no title. It will be perceived, however, that there are several vital differences from the case at bar. The Gaff's, being mortgagees, had a lien so well fixed as to be unassailable by subsequent transferees, while the appellee at the time of Picken's adjudication in bankruptcy, had not even a provisional priority, and could have none until she proved the Pickens transfer fraudulent.

A trustee in bankruptcy cannot draw unto himself property of the bankrupt in which the rights of others have vested, but where the rights of the creditors have not vested, the trustee takes title, *ipso facto*, to all the property of the bankrupt in order to distribute it according to the proper priorities when they shall have been determined.

In Eyster v. Gaff no attempt was made to interpose the proceedings in bankruptcy as a bar to further proceedings in the State Court, which, of course, could do nothing but proceed to a final settlement of the matter, according to the law to which it owed its existence; while in the case at bar, the appellant filed a pleading in proper form setting up the prior adjudication in the District Court, thus giving notice that a Court of competent jurisdiction had already taken the matter in hand, and furnished a ground for staying further proceedings pending the settlement of the estate of the bankrupt in accordance with Section 11 of the Bankruptcy Act.

The case of Bardes v. Hawarden Bank, 178 U. S. 154, has been relied on in the Court below to show that the State Courts alone have jurisdiction of suits by trustees in bankruptcy to collect the assets of the bankrupt. It will be seen that the case of Bardes v. Bank furnishes no parallel to this case for the following reasons: (1) Bardes v. Bank holds that "United States District Courts have no jurisdiction over independent suits brought by a trustee in bankruptcy to assert a title to money or property as assets of the bankrupt against *strangers* to the bankruptcy proceedings, *unless by consent* of the proposed defendants, such jurisdiction being denied them by Section 23 of the Bankruptcy Act of 1898."

In the case at bar it appears that the appellant is not a stranger to the bankruptcy proceedings and by electing to prove her debt in the District Court has given her consent to proceedings therein. (2) In Bardes v. Bank the parties denying jurisdiction had custody and possession of the property in question and a *prima facie* priority at the least. If the trustee wishes to dispute that priority he must come to them and sue them in the Court where he must have sued if no bankruptcy adjudication had taken place. While in the case at bar the appellant had custody and possession of the property

and if the appellee wishes to dispute his priority she must come to him and urge her claim in the tribunal proper to the appellant. If she refuses to do this and is on the point of illegally depriving him of the rights vested in him he may resort to his proper tribunal (in the case of a bankrupt, the District Court of the United States) to prevent such infringement on his rights.

The case of Frazier v. Southern Loan & Trust Co., 99 Fed. Rep. 707, has also been relied on by the appellee. This case is not binding authority on this Court, yet it will not be amiss to point out a few fundamental differences from the case at bar. (1) The State Court had *taken possession of the bankrupt's assets by its receiver* nearly five years before the adjudication in bankruptcy. (2) No attempt was made to set up the proceedings in bankruptcy in bar of a decree of sale. (3) The plaintiffs never proved their debt in the court of bankruptcy nor voluntarily submitted to its jurisdiction.

It has been urged that even conceding the jurisdiction of the District Court in such a suit by the trustees in bankruptcy, the appellant, being divested of title, has no standing in the District Court.

The District Court sitting in bankruptcy has a plenary equity jurisdiction over the estate of the bankrupt, except where specifically denied, as has been hereinbefore shown. If Dever Pickens has an equity in respect to his bankrupt estate he is entitled to the relief prayed for. He urges the following considerations:

1. To save unnecessary costs, expenses and time, as well as the entanglements and litigation that *must* ensue where two Courts of concurrent jurisdiction attempt to adjudicate in respect to the same subject matter, the settlement of the estate should be referred to the tribunal naturally proper to such proceedings, besides being more expeditious and less costly. His equity in the preservation of his estate.

2. As the record shows, the trustee in bankruptcy, Henry Haymond, is admittedly ignorant of his rights and duties, and permitted himself fraudulently to be drawn into courses prejudicial to the estate of his bankrupt.

Since the trustee, through fraud on the one hand and ignorance on the other, permits the estate to be wasted, it devolves upon the bankrupt himself to look after his own interests and his right to equitable relief in a court of bankruptcy is perfect.

Respectfully submitted,

DAVIS & DAVIS,
Counsel for Appellant.

John W. Davis.